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March 19, 2004

BY HAND DELIVERY

Mr. Walter Thomas
Secretary
Alabama Public Service Commission
RSA Union Building
8th Floor
100 N. Union Street
Montgomery, Alabama 36104

Re: Implementation of the Federal Communications Commission's Triennial Review Order - Phase II Mass Market Switching and Phase III Loop and Transport; Docket No. 29054

Dear Mr. Thomas:

Enclosed for filing are the original and ten copies of the Comments of Competitive Carriers of the South, Inc., in the above-referenced matter.

Sincerely,

Paul A. Clark

PAC:dpe
Enclosures

cc: Counsel of Record

STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION

March 19, 2004

IN RE: Implementation of the Federal	)	
Communications Commission's Triennial	)	*Docket No. 29054*
Review Order—Phase II Mass Market	)	
Switching and Phase III Loop and Transport	)	

COMMENTS OF COMPETITIVE CARRIERS OF THE SOUTH, INC.

Pursuant to the March 10, 2004 Notice issued by Judge Garner, requesting comments from parties regarding the effect of the decision of the U.S. Court of Appeals for the D.C. Circuit in U.S.T.A. v. FCC, Case No. 00-1012, March 2, 2004, ("*USTA*") on the above-captioned proceeding, the Competitive Carriers of the South, Inc. ("CompSouth")[1], respectfully urges the Alabama Public Service Commission ("Commission") to conduct and complete its hearings.

The *U.S.T.A* decision does not prevent the Commission from going forward with this case. To the contrary, the D.C. Circuit has stayed enforcement of its order vacating the TRO until a ruling on a motion for rehearing or rehearing en banc, or 60 days, whichever is later. Consequently, no mandate has issued and *the TRO is still in effect*. It is likely to remain so because a majority of the FCC has announced its strong disagreement with the D.C. Circuit opinion, and has ordered the FCC's general counsel to seek a stay and to seek review in the United States Supreme Court. The FCC is strongly supported in this position by the National Association of Regulatory Utility Commissioners, and others, including CompSouth.

[1] The members of CompSouth include: Access Integrated Networks, Inc., Access Point Inc., AT&T of the Southern States, L.L.C., Birch Telecom of the South, Inc., Cinergy Communications Company, CompTel/Ascent Alliance, Covad Communications Company, ITC Deltacom Communications, Inc., IDS Telecom, LLC, KMC Telecom III, KMC TelecomV , Inc., LecStar Telcom ,Inc., Momentum Business Solutions, Inc., Network Telephone Corp., NewSouth Communications, Corp., Nuvox Communications, Inc., PACE Coalition, Talk America, MCImetro Access Transmission Services, LLC, MCI WORLDCOM Communications, Inc., Xspedius Management Co., LLC, Z-Tel Communications, Inc.

Commissioner Michael Copps stressed the importance of states moving forward in these proceedings in his remarks to the National Association of Regulatory Utility Commissioners ("NARUC"). In his speech, Commissioner Copps stated that "...it is absolutely vital that the good work of the states continues. Whatever fact-finding efforts state commissions are engaging in now, I hope you keep to the course. I know that budgets and time are tight, by no one else can amass the absolutely essential information that the states can."[2] Commissioner Copps went on to emphasize that if a stay is not granted, and thus, the D.C. Circuit's mandate issues, it is the states that will have to "determine if the rules of the road have changed and how."[3]

During his remarks before NARUC, FCC Commissioner Kevin Martin, the person responsible for crafting the majority opinion in the Triennial Review Order, emphasized the importance of utilizing the policy expertise of state commissions.[4] Quoting Justice Thomas from AT&T v. Iowa Utilities Bd., Commissioner Martin stated that "In 1996, Congress decided to attempt to introduce competition into the market for local telephone service, it deemed it wise to take advantage of the policy expertise that the state commissions have developed in regulating such service."[5] He went on to say "states are competent to be involved in this process" and "they have a unique expertise that we should take advantage of."[6] Underscoring his belief in the importance of the role of state commissions in this endeavor, Commissioner Martin urged states

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[2] Excerpt from speech of FCC Commissioner Michael J. Copps to National Association of Regulatory Utility Commissioners, Winter Meeting, March 9, 2004.

[3] Id.

[4] Excerpt from speech of FCC Commissioner Kevin Martin to National Association of Regulatory Utility Commissioners, Winter Meeting, March 8, 2004.

[5] Id.

[6] Id.

to "...move forward with your best efforts to gather the critical factual data necessary for whatever lies ahead."[7] He concluded, "I am confident that, irrespective of the final outcome, the relevant data and factual information you have and will gather as part of the competitive market analysis will be vital to advancing the cause of local competition in the next phase of the Commission's process."[8]

It is expected that the incumbent local exchange carriers (ILECs), and particularly BellSouth, will express concerns over the time and resources of the Commission and the parties, as well as concerns over the significance of any decisions made by the Commission in the proceedings. They may go further and question whether the Commission would even be looking at the proper issues. As stated below, these concerns are either unfounded or are greatly outweighed by other matters.

Even if the *U.S.T.A.* decision survived the challenges from the FCC and others, it would still be critical that state commissions move forward with the state-specific investigatory and fact-finding role contemplated by the TRO. The D.C. Circuit did not make any finding of non-impairment and did not direct the FCC to make any such finding. Nothing in the D.C. Circuit's ruling suggests that evidence of actual deployment of facilities is irrelevant, or would be irrelevant under any standard to be adopted by the FCC. Thus, were the court's decision to take effect, the matter would be remanded to the FCC "for a re-examination of the issue." In that event, the FCC would need to base any further findings on granular, market-specific factual findings. For this reason, state commissions that gather the relevant facts within their jurisdictions would be able to provide important input to and thereby influence the FCC's

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[7] Id.

[8] Id.

ultimate findings. States will be able to play this critical role if-and only if-they provide the FCC with information on market conditions within that state. States that fail to move forward and develop an evidentiary record that they can share with the FCC would be unable to contribute to this critical debate.

U.S.T.A. recognizes both a fact-gathering and advisory role for state commissions. *U.S.T.A.* at 16-17. It was the decision-making role, not the fact-gathering or advisory roles of the state commissions, which the D.C. Circuit found invalid. Were the D.C. Circuit's mandate to issue, the FCC would still need the states' assistance to complete this task with any degree of granular accuracy. Moreover, having the evidence already collected and analyzed in a granular fashion at such time as the FCC proceeds with its § 251 impairment determinations would materially speed the FCC's completion of its massive task. There is obviously a compelling public interest in achieving a quick, clear and certain resolution to these controversies, to say nothing of the interests of the parties and their stakeholders. On the other hand, delaying fact gathering and analysis indefinitely until a final judgment is ultimately rendered in *U.S.T.A.* is not in anyone's interest, particularly not in the public's interest.

Based upon such considerations, state commissions in New York, Indiana, and Texas have already decided to proceed. The New York Public Service Commission explained:

> We will continue to be actively engaged in gathering relevant data and factual information as part of our analysis of the state of the competitive market in New York. At the end of the day, no matter who makes the ultimate decision - whether it is the FCC or the states - this factual data and analysis will be a critical component for our efforts to advance the competitive framework articulated by the FCC and the court.[9]

[9] Statement of William Flynn, chairman of the New York Public Service Commission, http://www.dps.state.ny.us/fileroom/doc14477.pdf.

The Indiana Utility Regulatory Commission also decided to go ahead with proceedings stating that "[t]he parties and the Commission have already invested significant resources in these TRO proceedings and there remains the possibility that the current issues and directives of the TRO will not change . . . We believe the most appropriate course of action with respect to the affected proceedings in this state is to not suspend or delay these TRO Causes."[10] The Public Utility Commission of Texas voted on March 10, 2004 to go ahead with TRO proceedings.[11]

The Commission retains full jurisdiction and authority under both state and federal law – quite independent of the TRO – to consider and order unbundling. The Commission already requires, pursuant to state law, that LECs "...unbundled their local networks into the following four basic network functions: 1) local loop; 2) local switching; 3) local interoffice facilities; and 4) signaling."[12] Indeed, the Commission has consistently approved interconnection agreements that provide service elements on an unbundled basis required by a Competitive Local Exchange Carrier ("CLEC") to provide quality and affordable services. Moreover, §§ 251(d)(3) and 261(c) of the Communications Act, as amended by the Telecommunications Act of 1996 ("Act"), plainly preserves state authority to establish unbundling regulations or policies that neither conflict with, nor substantially prevent implementation of, the Act's unbundling provisions.[13] A state finding of impairment under the Act for one or more elements in markets in that state, even

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[10] In The Matter Of: The Indiana Utility Regulatory Commission's Investigation Of Matters Related To The Federal Communications Commission's Report And Order And Order On Remand And Further Notice Of Proposed Rulemaking In CC Docket Nos. 01-338, 96-98, AND 98-147; Cause Nos. 42500, 42500-S1, 42500-S2

[11] Texas PUC March 10, 2004 Open Meeting, discussion of "Docket No. 28607, Impairment-Analysis for Local Circuit Switching for the Mass Market" (transcript not yet available)

[12] Local Competition and Price Regulation Order, Section 21.01, dated Sept. 20, 1995.

[13] In addition, section 252(g) authorizes state commissions to hold consolidated state proceedings to make federal law determinations necessary in implementing sections 251 and 252 of the Act.

though the FCC has either found no impairment on a national basis or has found impairment and has declined to require unbundled access, does not circumvent or thwart the statutory requirement of unbundled access to ILEC network elements.

There also is an independent basis for unbundling authority under 47 U.S.C.A. § 271. Under § 271 of the Act, as amended, RBOCs were granted permission to enter the long distance telephone market in exchange for unbundling their network elements and making them available to CLECs.[14] These independent state and federal law bases of authority are untouched by *U.S.T.A.*, which dealt only with FCC regulations regarding the implementation of the federal unbundling rules under § 251 of the Act. The Commission should proceed with hearings on those independent grounds.

The factual record compiled in these hearings will shed considerable light on the nature of the wholesale market for UNE-P, UNE-L, and related network elements for the mass market, and on the adverse consequences to consumers of granting the ILECs' request to eliminate UNE-P. The record is nearly ready for Commission review. The parties have completed several months of discovery and submitted Direct and Rebuttal pre-filed testimony. Once the last rounds of testimony are filed, all that remains to be done is a relatively short hearing and briefing by the parties. It is expected that a good deal of previous cross examination can be stipulated into the record in Alabama, thus minimizing the time needed for these cases. CompSouth estimates that the hearings can be completed in no more than five days.[15]

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[14] See BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Alabama Pursuant to Section 271 of the Telecommunications Act of 1996, Docket No. 25835.

[15] CompSouth is estimating that the hearings in both Phase II and Phase III of this docket can be completed within five days.

Going forward with the hearings would materially aid the Commission in performing its duties under state law and carrying out the pro-competitive policies of the Alabama General Assembly and of the Act. Accordingly, CompSouth urges the Commission to move forward with the previously scheduled hearing.

Respectfully submitted this 19th day of March 2004,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by U.S. Mail, properly addressed and postage prepaid, on this the 19th day of March, 2004:

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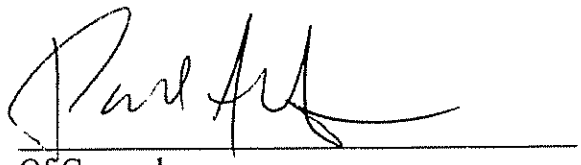

Of Counsel